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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

MRS. RUBY L. PORTER, ADMINISTRATRIX OF THE ESTATE OF JAMES A. PORTER, DECEASED,

Petitioner,

v.

ST. LOUIS–SAN FRANCISCO RAILWAY COMPANY,

Respondent.

No. 593

BRIEF
IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

The questions presented by petitioner have already been previously decided by this court adversely to petitioner's contentions. The Supreme Court of Mississippi based its decision on the Federal Employers Liability Act and nowhere questioned its validity but accorded full authority to it.

The decision of the Supreme Court of Mississippi was in complete accord with the prior decisions of this court. Petitioner shows no conflict with them.

The only complaint of petitioner is that the Supreme Court of Mississippi held that as a matter of law, petitioner's deceased Porter was not an employee of the Frisco, and, therefore, it was not liable to him under the Federal Employers Liability Act. This court has uniformly held that the relation of employer and employee must exist for

the Federal Employers Liability Act to apply and the relationship was to be understood in the ordinary conventional way.

Robinson v. *B. & O. Railroad Company*, 374 *U.S.* 1, 59 *L. Ed.* 849

Hull v. *P & R RR Company*, 252 *U.S.* 475, 64 *L. Ed.* 670

In both of the above cited cases the court held, as a matter of law, that the plaintiff was not an employee of the railroad at the time of the accident and there were directed verdicts for the railroad companies. This has been the uniform holding of Federal Courts:

> "Where there was no dispute as to any material fact in action under the Federal Employer's Liability Act, whether employee at time of accident was then engaged in his employment with defendant railroad was a question of law. Federal Employer's Liability Act, Sec. 1, et seq., 45 USCA, Sec. 51, et seq."

Quirk v. *New York C & St. L. R. Co.*, 189 *Fed. 2d* 97

Replying seriatim to petitioner's questions presented for review, we say:

The validity of the Federal Employer's Liability Act was not questioned but was sustained by the Supreme Court of Mississippi. There was no narrow or niggardly construction of the act to thwart the uniform application to railroad workers but the act was construed by the Supreme Court of Mississippi in accord and agreement with the prior rulings of this court.

The Supreme Court of Mississippi decided that the deceased was not an employee as a matter of law and this decision of the Supreme Court of Mississippi was based on the evidence offered by the plaintiff and not on any evidence of the defendant. When the decision of the Supreme Court of Mississippi is in accord with the prior decisions of this court, it cannot be said that it affords grounds for certiorari.

Statement Of The Case.

The Supreme Court of Mississippi stated the case fairly and clearly in its opinion. Petitioner's statement is erroneous in these respects:

There was no evidence that the yard clerk at the entrance of the Frisco yards was an agent of the Frisco and had authority to speak for it. (Page 6, Petitioner's Brief.) The evidence was not that the yard clerk told petitioner's foreman that there was one car *at* the far end. On the contrary, the evidence was that this yard clerk, in response to inquiry from the foreman as to whether or not the track was clear, stated that the track was clear except for one car *on* the far end.

There were no eye witnesses to the accident. The evidence was that the Frisco car was coupled with the other cars but there was no evidence that it collided with the other cars with "great force and violence" and no evidence that Porter was knocked from the top of the car. This can be deduced only by imposing inference upon inference. While there was evidence that Porter's body was severed by the train, there was no evidence that his body was in this position as a result of a fall caused by a collision and violence or in what manner it got between the rails. It could have been in that position as a result of Porter's slipping or undertaking to go between the cars and losing his hold, or other causes.

Reply To Argument.

Nowhere in the brief does petitioner allege that Porter was actually employed by the Frisco, but he attempts to reach employment by claiming that although he was paid by the Union Railroad Company in making delivery to the Frisco, it was for the use and benefit of the Frisco and the Frisco had the right to designate the place where delivery was to be received and Porter was subject to the general

operative rules and regulations while making the delivery. This was fully discussed by the Supreme Court of Mississippi which noted that no orders were given by Frisco and no directions as to where the delivery was to be received. Receiving delivery does not constitute the person making delivery the employee of the receiver. It is incident to all receipts of delivery that the receiving party has the right to designate the point at which the delivery is to be made and to expect the party making delivery to do so in an orderly and proper manner without becoming responsible for his acts in so doing.

Replying to the cases cited by petitioner:

Sinkler v. *Missouri Pacific Railroad Co.*, 356 U.S. 318, was not a case between employer and employee, but related to liability by the railroad for the act of an agent which is specifically provided in the statute.

In the case of *Porter* v. *St. Louis–San Francisco Railway Company*, 354 Fed. 2d, 840, which was this case on appeal before the Court of Appeals For The Fifth District, the court made no finding as to liability or whether or not the relationship of master and servant existed but held that the removal of the case to the Federal Court on the pleadings was improper and reversed the case on the matter of removal and not on a question of liability or existence of the relationship of master and servant.

The Supreme Court of Mississippi considered all of the cases cited by petitioner and in its opinion discussed the cases of

Hull v. *Philadelphia & Reading Ry. Co.*, 252 *U. S.* 475, 64 *L. Ed.* 670

Linstead v. *Ches. & Ohio RR Co.*, 276 *U. S.* 28, 48 *S. Ct.* 241, 72 *L. Ed.* 453

Shenker v. *B. & O. R. R. Co.*, 83 *S. Ct.*, 1667, 347 *U. S.* 1, 10 *L. Ed.* 700

Lavender v. *Kurn*, 327 *U.S.* 645, 66 *S. Ct.* 740, 90 *L. Ed.* 916

Byrne v. *Penn. R. R. Co.*, 262 *F.* 2*d* 906,

as being in harmony with it.

Conclusion.

The granting of certiorari and review of this case by this court would add nothing to the applicable law. It would involve no question peculiar to Federal Law. Any decision on the law different from that of the Supreme Court of Mississippi would be in conflict with the former and established decisions of this court. It is not enough to call the decision of the Supreme Court of Mississippi narrow and niggardly without showing any ground to sustain such claim.

Wherefore, respondent submits that petitioner is not entitled to have this case reviewed again and that the petition for writ of certiorari to the Supreme Court of Mississippi should be denied.

Respectfully submitted,
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Certificate Of Proof Of Service.

I, C. R. Bolton, Attorney for the respondent herein, and a member of the bar of the Supreme Court of the United States, hereby certify that I received copy of the petition for writ of certiorari on September 24, 1968, and I am this day serving copies of the above and foregoing Brief In Opposition To Petition For Writ Of Certiorari To The Supreme Court Of The State Of Mississippi by mailing same in properly addressed envelopes with first class postage prepaid to Honorable Frank E. Everett, Jr., Counsel for Petitioner, First National Bank Building, Vicksburg, Mississippi; Honorable William W. Ramsey, Attorney, First National Bank Building, Vicksburg, Mississippi; and Honorable John B. Farese, Attorney, Ashland, Mississippi.

This the 17 day of October, 1968.

C. R. BOLTON,
Attorney For Respondent,
Tupelo, Mississippi.